5 *Official Opinion of the Compliance Board* 33 (2006)

CLOSED SESSION PROCEDURES –WRITTEN STATEMENT – MINUTES – CLOSED SESSION STATEMENT – TOPIC DESCRIPTION REITERATING STATUTORY AUTHORITY, HELD TO BE A VIOLATION - "MEETING" – TRAINING SESSION ADDRESSING LEGAL ISSUES IN THE ABSTRACT HELD NOT TO BE A MEETING – AS APPLIED TO PUBLIC BODY, HELD TO BE A MEETING – EXECUTIVE FUNCTION EXCLUSION – HELD TO BE WITHIN THE EXCLUSION – EXCEPTIONS PERMITTING CLOSES SESSIONS – LEGAL ADVICE – OFFERING OF ADVICE BY SCHOOL SYSTEM LAWYER TO SCHOOL BOARD, HELD TO BE WITHIN THE EXCEPTION

May 24, 2006

Ms. Donna J. Crook

The Open Meetings Compliance Board has considered your complaint alleging that the Frederick County Board of Education ("County Board"), a public body on which you serve, has committed several violations of the Open Meetings Act.

For the reasons explained below, we conclude as follows: (1) In several instances, the County Board's documentation in connection with closed sessions was inadequate, although examples from recent meetings evidence compliance with this aspect of the Act's procedures. (2) The Act did not apply to a training session conducted during August 2004 by the school system's Executive Director of Legal Services. (3) The County Board did not violate the Act when it closed meetings to consult with an attorney other than the lawyer designated as counsel to the County Board.

I

Adequacy of Written Statements

A. Complaint and Response

According to the complaint, the County Board has routinely provided "uninformative boilerplate" to the public in its written statements produced prior to closing meetings as well as in the summaries of closed meetings that are subsequently made available to the public. The complaint noted prior Compliance

Board opinions in which we have repeatedly advised public bodies that merely repeating the applicable statutory provision authorizing a closed meeting is inadequate. Despite this body of precedent, the complaint continued, your efforts to convince your colleagues on the County Board to expand the level of disclosure have proved unsuccessful. Enclosed with the complaint were copies of closed session announcements and publicly available minutes documenting prior closed sessions on the following dates: June 8, 2005; July 13, 2005; August 10, 2005; October 26, 2005; November 1 and 21, 2005; and January 11, 2006.[1] By way of illustration, the complaint addressed in detail the level of disclosure in connection with two meetings, June 8 and November 1, 2005.

In a timely response on behalf of the County Board, Judith Bresler, Esquire, the Board's counsel, acknowledged prior Compliance Board opinions in which we stated that "the mere parroting or rote paraphrase of the applicable exception is not acceptable as a topic description." 4 *OMCB Opinions* 142, 145 (2004) (internal citations and quotation marks omitted). The County Board described a change in practice about written statements used in closing a meeting before and after August 24, 2005 – the date of a training session for the County Board on the Open Meetings Act. By way of example, the County Board cited statements prepared in connection with sessions held on November 1 and 21, the sessions addressed in the complaint, as well as subsequent sessions about which more detailed disclosure was provided. Given this change in practice, the County Board urged that we not find a violation, citing prior Compliance Board opinions for the proposition that "when a local board recognizes its error and makes a good faith effort to self-correct, a violation will not be found."

B. Analysis

If the Open Meetings Act applies to a meeting that a public body closes to public observation, certain procedural requirements must be followed. Among these is that the presiding officer must "make a written statement of the reason for closing the meeting, including a citation of the authority under [§ 10-508], and a listing of the topics to be discussed." § 10-508(d)(2)(ii).[2] Subsequent to a closed session, the public body must make available to the public, as part of its minutes, certain information in connection with the closed session, namely "(i) a statement of the time, place and purpose of the closed session; (ii) a record of the vote of each member as to closing the session; (iii) a citation of the authority under [§ 10-508] for

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[1] The announcements of closed sessions enclosed with the complaint apparently were part of agendas posted on an Internet website and did not constitute the official written statements prepared in closing the sessions. The latter documents were provided to us as part of the County Board's response.

[2] All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

closing the session; and (iv) a listing of the topics of discussion, persons present, and each action taken during the session." § 10-509(c)(2).

Notably, both of these requirements call for *both* a citation of statutory authority *and* a "listing of the topics" at the meeting, both as anticipated and as actually occurring. While public bodies need not disclose a level of detail about the topic that undermines the confidentiality permitted by the Act, we have repeatedly advised that "saying nothing beyond the statutory language deprives the public of information to which it is entitled" in connection with a closed session. 4 *OMCB Opinions* 114, 118 (2005).

The County Board has acknowledged that, for meetings prior to its training session on August 24, 2005, the written statements and summaries provided in publicly available minutes were inadequate, in that they merely repeated the words of the applicable statutory exceptions. Thus, as to these sessions, the Act was violated.[3] Considering the County Board's acknowledgment, we focus on the subsequent meetings noted in the complaint.

The written statement prepared in connection with the closed session held on October 26, 2005, cited § 10-508(a)(1) and (7) and noted under the caption "General Description of Topic(s) to be Discussed," the following: "to discuss a personnel matter [and] to consult with counsel to obtain legal advice on pending litigation." The copy of the minutes available to the public, labeled "DRAFT REGULAR MINUTES," contained the identical description. While the description concerning the County Board's planned discussion with counsel provided limited information beyond merely paraphrasing the statutory exemption, the same cannot be said about the personnel matter. This topic description provided no information beyond the words of the statutory exception itself, an omission that deprived the public of any opportunity to evaluate whether the topic fit within the exception. *See, e.g.,* 4 *OMCB Opinions* 142, 145-46 (2005); *see also* 4 *OMCB Opinions* 46, 48-49 (2004). Assuming the final minutes as approved were consistent with the draft submitted with the complaint, the minutes suffered from the same deficiency.[4]

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[3] While the County Board cited prior opinions in which we declined to find a violation in light of a public body's corrective action, these opinions are inapposite, because they dealt with single meetings when discussion was cut off promptly after it was realized that the discussion was extending beyond permissible limits. We commend the County Board's action in scheduling training on the Open Meetings Act, but that action cannot cause us to overlook violations that occurred in prior meetings.

[4] We shall assume for purposes of our discussion that the text of the final minutes approved by the County Board was consistent with the draft minutes submitted for our review.

Similarly, for the meeting held on November 21, 2005, the written statement cited § 10-508(a)(1), (3), and (8) as authority for the closed session. The County Board's topic descriptions, paralleling these exceptions, were as follows: "Discuss a recommendation for personnel action," "Consult with counsel re pending litigation," and "Consider acquisition of real property." The first and third are manifestly deficient, in that they simply echo the statutory text. The minutes likewise were deficient. The second adds a tiny piece of additional information (who would be consulted about the litigation) but not anything else about the topic itself. The written statement prepared in advance of the closed session held on January 11, 2006, appears to be more informative, but the minutes merely parroted the statutory exemption.

Compliance with the Act does not require much. For example, the second item in the November 21 closed session ("Consult with counsel re pending litigation") would have been adequate had it read, "Consult with counsel re probability of success in defending pending lawsuit," or some similar phrase that provided at least enough information to enable a citizen to understand that, yes, a closed session on this topic really does seem to be justified by the statutory exception.

Another example of compliance may be found in the County Board's written statements and minutes for meetings held on November 1, 2005, which were closed pursuant to § 10-508(a)(7), the "legal advice" exception. These described the purpose of the session as "[t]o obtain legal advice regarding interpretation and application of an attorney general's opinion." This description satisfied the Act's minimal "listing of the topic" requirement.

Moreover, we note two examples of written statements from more recent meetings, March 8 and 22, 2006, included by the County Board with its response, in which the description of the topics to be discussed in closed session was more informative. If the latter examples reflect a trend in the County Board's practice, its action is to be commended.

II

Legal Advice and Training Sessions

A. Complaint and Response

The complaint raised questions about the County Board's reliance on § 10-508(a)(7), authorization for a public body to go into closed session "to consult with counsel to obtain legal advice," and the executive function exemption from the Act, § 10-503(a)(1)(i), for purposes of receiving training in connection with legal matters. Specifically, the complaint noted that on November 1, the County Board apparently received legal advice regarding the interpretation and application of an Attorney General's opinion in a meeting closed pursuant to § 10-508(a)(7). However, in August, the County Board received training from an attorney on the

Open Meetings Act, a session treated as an executive function to which the Open Meetings Act did not apply. According to the complaint, "[b]oth meetings appear similar in that the [County Board] is being advised on how to comply with laws that affect it." The complaint questioned whether a public body may receive training on a legal matter in a closed session under either or both of these rationales. Citing 4 *OMCB Opinions* 58 (2004), in which we recognized that a public body could close a session under §10-508(a)(7) to receive training from an attorney concerning the Open Meetings Act, the complaint questioned how a matter could be subject to the Act by virtue of the proper application of § 10-508(a)(7), yet be considered as outside the Act by virtue of the executive function exclusion.

The County Board responded as follows: "Although there is a solid basis for categorizing training for the purpose of improving the way in which members of a public body transact the public's business as an executive function, it would appear that the gathering itself would not even be properly characterized as a 'meeting' under the Open Meetings Act." Relying on a 1995 Attorney General's opinion, the County Board concluded that "[i]nformational training on legal requirements or operational procedures of the [County] Board itself" was not a "meeting" for purposes of the Act, in that the County Board did engage in "the consideration or transaction of public business." § 10-502(g). By contrast, the County Board observed, the opinion relied on in the complaint, 4 *OMCB Opinions* 58 (2004), involved specific compliance issues, not general training. In the County Board's view, the conduct of training, even by a lawyer, has a distinctly different status than a lawyer's rendering of legal advice: the former is outside the Act, whereas the latter is within it, albeit amenable to an exception allowing closed meetings.

B. Analysis

We do not discern the contradiction discussed in the complaint. The fact that a lawyer is presenting on a legal topic does not, in itself, determine whether the Act applies to the presentation. There are several possibilities: The presentation could be sufficiently disconnected from the public body's conduct of public business as to be outside the Act altogether. Or, it could be related to a public body's conduct of public business on an administrative matter excluded from the Act as an "executive function" and closed on that basis. Or, it could be an executive function that the public body voluntarily treats as if the Act applied and closes under the Act's exception for the rendering of legal advice. Or, it could be related to a public body's conduct of public business on, for example, a quasi-legislative matter, subject to the Act but able to be closed under the legal advice exception.

When, on November 1, 2005, the County Board met with an attorney employed by the school system to discuss the impact of an opinion of the Attorney General, we do not know whether the topic of discussion might have been excluded from the Act as an executive function. It does not matter. This is a straightforward case of legal advice sought and given, with no indication of discussion beyond that.

Whether they needed to invoke the exception or not, the County Board properly relied on § 10-508(a)(7) to close the meeting.[5]

We next assess the August training session. The County Board's response did not describe this session in any detail, so our analysis considers alternative ways of characterizing the training session. As we shall explain, however, the result is the same: the Act did not apply.

Training opportunities for public body members occur in various settings and with varying degrees of specificity. One venue is a meeting of a membership organization – the Maryland Association of Boards of Education, for example, or its counterparts for county and municipal officials. A decade ago, Attorney General Curran concluded that the Open Meetings Act did not apply to "leadership and team-building training sessions" hosted by the Maryland Association of Counties, despite the presence of a quorum of the St. Mary's County Board of Commissioners. 80 *Opinions of the Attorney General* 241 (1995). The Attorney General wrote that, while such training "might ultimately make the County Commissioners more effective at conducting future public business, it did not involve the conduct of public business." 80 *Opinions of the Attorney General* at 242. Therefore, it was not a meeting. *See* § 10-502 (g) (definition of "meet"). The same would be true about Open Meetings Act training in this setting.

The August training for the County Board, however, did not occur in an organizational venue. Instead, the presentation was given solely to that public body in its own meeting room. We must consider two possibilities. One is that the presenter and the members, exercising heroic self-restraint, avoided any discussion about the law's application to particular situations facing the public body. If this is what happened – and we cannot rule it out on the record before us – it would have been no different than a lecture at an association meeting. In other words, if the August training addressed requirements of the Open Meetings Act in the abstract, not as applied to the County Board's own practices, and if the County Board members avoided discussion about the practical impact of the law, there was no conduct of public business, in which case the Act did not apply.

The other, and frankly more realistic, possibility is that the Open Meetings Act presentation ranged from general precepts to particular applications, the latter in the context of how the County Board conducts its meetings. Indeed, because the County Board was at pains to demonstrate that its record-keeping practices had improved as a result of the training, our inference is that the presentation was not like an academic lecture. Busy public officials, given information about something that they must consider in carrying out their responsibilities, would want to know what it means to them and what to do about it. *See, e.g.,* 4 *OMCB Opinions* 58, 60 (2004). This, surely, is the conduct of public business.

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[5] We address the fact that this attorney was not specifically designated as counsel to the County Board in Part III below.

So, under this view of what happened, the training session was a meeting. Yet, that conclusion does not end the matter, for some meetings are excluded from the Act. The County Board asserts that, if the training session were deemed a meeting, it was excluded from the Act as an executive function. §§ 10-502(d) and 10-503(a)(1)(i). In considering whether a particular matter involves an executive function, we apply a two-part test: First, is the topic of discussion within any other defined function? If so, the discussion is not an executive session. Second, if the discussion is not another defined function, does it involve the administration of existing law? *See, e.g.*, 5 *OMCB Opinions* 7, 8 (2006).

The training session was not an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function. Moreover, it did involve the administration of the Open Meetings Act, a law that the County Board must consider and apply regularly. How the County Board gives notices of its meetings, what is to be included in the notices, what level of detail is called for or prudent in the documents required by the Act: these are all administrative details for which the County Board is responsible and that, presumably, were discussed during the August training session. If this is what took place, it was an executive function.

II

Meetings with Legal Counsel

A. Complaint and Response

The complaint questioned whether § 10-508(a)(7) allows a public body to meet in closed session to hear legal advice from an attorney with whom no attorney-client privilege would exist. This issue relates to a meeting during which the County Board received training from an attorney who is employed by the school system but who does not serve as counsel to the County Board. The complaint characterized an early Compliance Board opinion, 1 *OMCB Opinions* 53 (1993), as apparently indicating that § 10-508(a)(7) "may only be used when there exists a clear attorney-client privilege." A supplemental letter elaborated on this concern, noting that during three meetings closed pursuant to § 10-508(a)(7), the only attorney present was Jamie Cannon, Executive Director of Legal Services for the Frederick County School System. Judith Bresler, who serves as counsel to the County Board, was not present.

The County Board rejoined that the organizational distinction between the two attorneys presented in the complaint is groundless, because the Frederick County Public School System is not a separate legal entity: "There is only one legal entity, know as the Board of Education of Frederick County." Moreover, the County Board continued, it may retain "as many counsel to represent it as it deems necessary," each with different areas of expertise and roles," but all of whom are "counsel" for purposes of the "legal advice" exception in the Act. "[T]here is nothing inappropriate or illegal about the [County] Board receiving legal advice

from in-house counsel in closed session as it relates to any other number of issues that come before it."

B. Analysis

The County Board's position is that, despite the difference in titles, Ms. Cannon is as much "counsel" to the Board as Ms. Bressler. The implication, then, is that, contrary to the complaint's premise, communications between the County Board and Ms. Cannon are subject to the attorney-client privilege. While we see much merit in this argument, we need not explore it further. In our view, the existence (or not) of an attorney-client privilege under the laws of evidence is beside the point.

In the 1993 opinion cited in the complaint, we wrote that the "legal advice" exception, §10-508(a)(7), "does *not* allow for closed discussion among members of the public body merely because an issue has legal ramifications. Nor does the exception apply to a discussion between the public body and anyone other than its lawyer." 1 *OMCB Opinions* at 54. The complaint apparently inferred from this statement that a prerequisite to reliance on § 10-508(a)(7) is the existence of an attorney-client privilege.

This interpretation of our opinion is unwarranted. The phrase "its lawyer" meant, in this opinion and others, a lawyer designated by the public body to impart legal advice, that is, "the lawyer's interpretation and application of legal principles to specific facts in order to guide future conduct." 4 *OMCB Opinions* 58, 59 (2004) (internal quotation marks omitted). We have never circumscribed § 10-508(a)(7) by reference to the technicalities of whether an attorney-client privilege exists. As the County Board correctly pointed out, there is no reason why the County Board may not engage two or more attorneys for various purposes, each of whom might be called upon to offer pertinent legal advice. Thus, we find that the County Board did not violate the Act when invoking §10-508(a)(7) to hold closed meetings to obtain legal advice from Ms. Cannon, an attorney employed as the school system's Executive Director for Legal Services.

V

Conclusion

We find as follows: In several instances, the County Board's documentation in connection with closed sessions cited in the complaint was inadequate, in that the documentation failed to provide any information beyond the language in the applicable exception allowing the closure of a meeting. There was no violation with regard to a training session conducted for the County Board in August 2004 by the school system's Executive Director of Legal Services, because the Open Meetings Act did not apply to it. Finally, the County Board did not violate the Act when it

closed meetings under § 10-508(a)(7) to consult with a school system attorney other than its formally designated counsel.

OPEN MEETINGS COMPLIANCE BOARD

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